

No. 48699-7-II

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

STEVEN G. THURMAN, Appellant

APPEAL FROM THE SUPERIOR COURT
OF LEWIS COUNTY

THE HONORABLE RICHARD L. BROSEY

BRIEF OF APPELLANT

Marie J. Trombley
WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF FACTS.....	1
III. ARGUMENT.....	6
A. Mr. Thurman Received Ineffective Assistance of Counsel Where Counsel Failed To Request A Competency Evaluation. ..	6
B. This Court Should Not Award Costs If The State Substantially Prevails On Appeal.	10
IV. CONCLUSION	12

TABLE OF AUTHORITIES

Washington Cases

<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001) _____	10
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015) _____	11
<i>State v. Coville</i> , 88 Wn.2d 43, 558 P.2d 1346 (1977) _____	8
<i>State v. Heddrick</i> , 166 Wn.2d 898, 215 P.3d 201 (2009) _____	7
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000) _____	10
<i>State v. P.E.T.</i> , 174 Wn.App. 590, 300 P.3d 456 (2013) _____	10
<i>State v. Sinclair</i> , 192 Wn.App. 380, 367 P.3d 612 (2016) _____	10
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) _____	8
<i>State v. White</i> , 80 Wn.App. 406, 907 P.2d 310 (1995) _____	8
<i>State v. Wicklund</i> , 96 Wn.2d 798, 638 P.2d 1241 (1982) _____	6
<i>State v. Wright</i> , 19 Wn.App. 381, 575 P.2d 740 (1978) _____	9

U.S. Supreme Court

<i>Godinez v. Moran</i> , 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) _____	6
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) _____	8

Statutes

RCW 10.73.160(1) _____ 10

RCW 10.77.050 _____ 6

RCW 10.77.060(1)(a) _____ 7

Rules

RAP 14.2 _____ 10

I. ASSIGNMENTS OF ERROR

- A. Mr. Thurman received ineffective assistance of counsel when counsel did not request a competency evaluation prior to sentencing.
- B. This Court should not impose costs on appeal.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

- A. Is it ineffective assistance of counsel where counsel does not request a competency evaluation, when there is sufficient evidence to suggest the defendant is not competent to proceed?
- B. Should this Court exercise its discretion to deny an award of appellate costs should the State substantially prevail on appeal where the defendant is indigent, medically compromised, and over sixty years of age?

II. STATEMENT OF FACTS

Lewis County prosecutors charged sixty-four-year-old transient Steven Thurman with three counts of assault third degree based on events that occurred on November 23, 2015. (CP 3; 15-17). Prior to trial the court granted a motion for expenses to be

paid for an expert evaluation for possible diminished capacity defense. (CP 11-12). There is no indication in the record that the psychologist's report was ever presented to the trial court judge.

According to the affidavit of probable cause, officers contacted Mr. Thurman at a nail salon. He had entered the salon, drinking a beer, and allegedly refused to leave. (CP 5). Mr. Thurman was cold, wet, soaked in urine, agitated, belligerent, had slurred speech and smelled of alcohol. (1/20/16 RP 34; 43). He was arrested and officers transported him by ambulance to the hospital for a medical evaluation. (CP 5; 1/20/16 RP 33). No reason was given why Mr. Thurman would need medical attention.

The R.N. assigned to Mr. Thurman reported she knew him from the other 10 to 15 times he had been brought to the hospital. (1/20/16 RP 34). In the past, when Mr. Thurman was brought to the hospital he left when he found out they would not give him food. (1/20/16 RP 38).

She entered the room to make an initial assessment. (1/20/16 RP 40). She put a blood pressure cuff and oxymeter on him. (1/20/16 RP 44). Mr. Thurman ripped them off and threw them on the floor. (1/20/16 RP 39). As the nurse bent down to retrieve them, Mr. Thurman swung his fist and caught the fabric of

her scrubs jacket. She was not injured. (1/20/16 RP 35; 47). He yelled at her to get out of the room and to leave him alone. (1/20/16 RP 39). She covered him with a warm blanket, turned down the lights, and called security. (1/20/16 RP 36).

Dr. Derry entered the room and thought Mr. Thurman was pretending to be asleep. She asked him some questions and heard him mumble "let me sleep". (1/20/16 RP 60; 69). She asked him to open his eyes and he swung at her with his right hand. He did not hurt her. (1/20/16 RP 60). She told him she would call the police and left the room. (1/20/16 RP 63).

The hospital security officer described Mr. Thurman as "normally intoxicated", stating he is "a functional alcoholic, and we deal with him very often." (1/20/16 RP 101). Officer Lowrey testified in his prior contacts Mr. Thurman was always intoxicated. (1/20/16 RP 120).

Police officers arrived and arrested Mr. Thurman. (1/20/16 RP 92). They removed him from the hospital and placed him in a patrol car. (1/20/16 RP 94). The officer testified Mr. Thurman, who was not wearing shoes, kicked the driver's side rear window while he was in the backseat. (1/20/16 RP 94). The officer opened the door and Mr. Thurman continued kicking. (1/20/16 RP 95; 104).

The officer grabbed Mr. Thurman's legs, and as he yanked him out of the car, Mr. Thurman hit the cement. (1/20/16 RP 105). He was taken back into the hospital for medical treatment for the injuries suffered from hitting the ground. (1/20/16 RP 117).

The officer reported that Mr. Thurman vacillated between saying, "When I'm in jail I'm going to get my teeth done. I'm going to get fed. I've got a place to sleep. I'm going to get my medical bills paid for" and insisting that he had not assaulted anyone. (1/20/16 RP 121).

The jury found Mr. Thurman guilty on all counts. (CP 75-77). The court ordered a pre-sentence DOSA screening. (CP 78). The DOSA evaluator found Mr. Thurman was not eligible for a DOSA sentence because of mental health issues and recommended a mental health evaluation instead. (CP 81). Mr. Thurman reported to the evaluator he was homeless before his trial and expected he would be homeless when he was released, had no supportive family, and subsisted on social security disability because of a bone disease. (CP 82). During his evaluation he "would rant about suing the police department" and became "extremely agitated". (CP 82). Although Mr. Thurman told the evaluator he had no alcohol problem, he reported drinking a 24 pack of beer and a fifth daily.

He also reported he uses between 50 and 100 dollars per day in methamphetamines. (CP 82). Mr. Thurman had been previously diagnosed with anxiety and depression and was actively suicidal at the time of the assessment. (CP 82).

At sentencing, the court declined to grant a DOSA, stating, "The evaluator basically says that he is not eligible because of a mental issue." (3/2/16 RP 189). When asked if he had anything to say to the court before sentencing, Mr. Thurman said:

"Your Honor, I wouldn't make a story up about being tased. He [police officer] tased me. I have the scars to prove it. He took me to the hospital. I had bandages on both arms. Why he drug me, I don't know. I didn't do anything. I was merely smoking a cigarette across the street, from there I was going to go down to the post office. From there, I was going down to Destiny where I had my suitcases, and going back to Morton where I lived there for over 25 years. And I've got friends there. That's what my intentions are when I get out, is go back to Morton, go back to the mountains.

(3/2/16 RP 189).

The court imposed a 14 month sentence. (CP 89). The court imposed only the mandatory legal financial obligations of \$756 after learning that Mr. Thurman's income was a \$1,000 per month disability check. (CP 91; 3/2/16 RP 190).

The court authorized Mr. Thurman to seek review at public expense, to include filing fees, attorney fees, cost of preparation of briefs, the verbatim report of proceedings, and the cost of preparation of necessary clerk's papers. (CP 100). Mr. Thurman makes this timely appeal. (CP 102).

III. ARGUMENT

A. Mr. Thurman Received Ineffective Assistance of Counsel Where Counsel Failed To Request A Competency Evaluation.

"Requiring that a criminal defendant be competent has a modest aim: it seeks to ensure that he has the capacity to understand the nature of the charges against him and whether he is able to rationally assist his counsel." *Godinez v. Moran*, 509 U.S. 389, 402, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); RCW 10.77.050. No incompetent person may be tried, convicted or sentenced for the commission of an offense so long as he remains incompetent. *State v. Wicklund*, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982); RCW 10.77.050.

Whenever there is reason to doubt a defendant's competency, the court or a party may on motion have the

defendant psychologically evaluated and a report prepared on his mental condition. RCW 10.77.060(1)(a). A competency hearing is mandatory whenever a legitimate question of competency is presented. Failing to observe the procedures, as outlined in RCW 10.77, which are necessary and adequate to protect an accused's right not to be tried while incompetent is a denial of due process. *State v. Heddrick*, 166 Wn.2d 898, 904, 215 P.3d 201 (2009).

Here, there was psychological information from the DOSA evaluation which should have alerted defense counsel to question Mr. Thurman's competency and request an evaluation at the sentencing hearing. The DOSA evaluator found Mr. Thurman extremely agitated, a heavy drug and alcohol user, and actively suicidal. He reported that Mr. Thurman "ranted about suing the police department" and had to be "re-directed continually". (CP 82). The evaluator concluded Mr. Thurman's mental health issues precluded benefit from chemical dependency treatment. (CP 81-82).

Further, Mr. Thurman's statements at his sentencing were the comments of an individual who did not have a factual and rational understanding of the charges and court proceedings he faced. He believed an officer tased him for no reason while he was

smoking a cigarette. (3/2/16 RP 189). Mr. Thurman's attorney should have brought the issue of competency to the court's attention.

Ineffective assistance of counsel is a mixed question of law and fact, and the claim is reviewed *de novo*. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995). To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient: that it fell below an objective standard of reasonableness based on consideration of all of the circumstances. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

The defendant must also show a reasonable probability that but for the deficient performance the results of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceedings. *Strickland*, 466 U.S. at 694.

Under Washington law, a defendant's counsel does not have the power to waive the defendant's right to not be tried, convicted, or sentenced while incompetent. *State v. Coville*, 88 Wn.2d 43, 47, 558 P.2d 1346 (1977). Where counsel knows or has reason to

know of a defendant's incompetency, no legal tactics or strategy can excuse failure to raise the issue. RCW 10.77.050.

Considering the circumstances, DOSA recommendation and Mr. Thurman's comments at sentencing, counsel should have moved for an evaluation of Mr. Thurman's competency. Failure to do so fell below an objective standard of reasonableness.

On the second prong, a defendant cannot be tried, convicted or sentenced while incompetent. There is sufficient evidence that would lead to questioning Mr. Thurman's competency before, during and after trial, and there is a probability "sufficient to undermine confidence in the outcome" of the proceedings,

Washington courts have held that remand is the proper remedy when a trial court should have had a competency hearing but did not. In *State v. Wright*, the Court noted:

"In certain unique situations facts coming to light only after the trial may be so significant and compelling as to create 'reasonable grounds' to question a defendant's competency at the time of his trial and therefore require a hearing on the question."

State v. Wright, 19 Wn.App. 381, 389, 575 P.2d 740 (1978) (citing *Tinsley v. State*, 260 Ind. 577, 298 N.E.2nd 429 (1973)).

Mr. Thurman asks this Court to remand to the trial court to determine whether a retrospective competency determination is feasible. *State v. P.E.T.*, 174 Wn.App. 590, 606, 300 P.3d 456 (2013). If it is not feasible, this Court should instruct the superior court to vacate the convictions and sentence. *In re Fleming*, 142 Wn.2d 853, 867, 16 P.3d 610 (2001).

B. This Court Should Not Award Costs If The State Substantially Prevails On Appeal.

RAP 14.2 authorizes the State to request the Court to order an appellant to pay appellate costs if the State substantially prevails on appeal. The appellate courts may deny awarding the State the costs of appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn.App. 380, 382, 367 P.3d 612 (2016). The indigent appellant must object, before the Court has issued a decision terminating review, to any such cost bill that might eventually be filed by the state. *Sinclair*, 192 Wn.App. at 395-394.

In exercising its discretion, a defendant's inability to pay appellate costs is a significant factor to consider when deciding whether to impose such costs. *Sinclair*, 192 Wn.App. at 382. The Washington Supreme Court recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants, which include an interest rate of 12 percent, court oversight until LFOs are paid, and long term court involvement which "inhibit re-entry" and an increase in the chance of recidivism. *State v. Blazina*, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). An appellate court should deny an award of costs to the State if the defendant is indigent and lacks the ability to pay. *Sinclair*, 192 Wn.App. at 382.

In *Sinclair*, the defendant was indigent, aged, and facing a lengthy prison sentence. The Court determined there was no realistic possibility he could pay appellate costs and denied award of those costs. *Sinclair*, 192 Wn.App. at 392.

Similarly, Mr. Thurman is indigent and lacks an ability to pay appellate costs. He is 63 years old, subsists on SSI, has a bone disease, and there is no evidence of a work history. His mental health and substance abuse issues are well documented. At his sentencing, the trial court chose not to impose any discretionary

legal financial obligations because it was unrealistic to expect Mr. Thurman's financial situation to improve. Given these factors, Mr. Thurman respectfully asks this Court to exercise its discretion and order no costs be awarded should the state substantially prevail on appeal.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Thurman respectfully asks this Court to remand for a hearing on the feasibility of a retrospective competency evaluation or a vacation of his convictions and sentencing based on ineffective assistance of counsel.

Respectfully submitted this 17th day of August, 2016.

Marie Trombley, 41410
PO Box 829
Graham, WA 99338
253-445-7920
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Steven Thurman, do hereby
certify under penalty of perjury under the laws of the United States
and the State of Washington, that a true and correct copy of the
Appellant's Opening Brief was sent by first class mail, postage
prepaid on August 17, 2016 to:

Steven G. Thurman, DOC 378531
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

And I electronically served, by prior agreement between the parties,
a true and correct copy of the Appellant's Opening Brief to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov
sara.beigh@lewiscountywa.gov

Marie Trombley, 41410
PO Box 829
Graham, WA 99338
253-445-7920
marietrombley@comcast.net

TROMBLEY LAW OFFICE

August 17, 2016 - 1:12 PM

Transmittal Letter

Document Uploaded: 5-486997-Appellant's Brief.pdf

Case Name: State v. Steven Thurman

Court of Appeals Case Number: 48699-7

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Marie J Trombley - Email: marietrombley@comcast.net

A copy of this document has been emailed to the following addresses:

appeals@lewiscountywa.gov

sara.beigh@lewiscountywa.gov